IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

EARL COFIELD, et al. *

Plaintiffs *

vs. * CIVIL ACTION NO. MJG-99-3277

LEAD INDUSTRIES ASSOCIATION, INC., et al. *

Defendants

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MEMORANDUM AND ORDER RE PLAINTIFFS' MOTION TO AMEND FIRST AMENDED COMPLAINT

The Court has before it Plaintiffs' Motion to Amend First Amended Complaint [Paper No. 103] and the materials submitted by the parties relating thereto. The Court has held a hearing and has had the benefit of the arguments of counsel.

I. BACKGROUND

Plaintiffs filed this lawsuit in the Circuit Court for Baltimore City on September 20, 1999, alleging that their homes are contaminated and diminished in value by virtue of lead paint which is, or was, present on the interior and exterior of their homes. Plaintiffs have sued various lead pigment manufacturers, lead paint manufacturers and lead-related trade associations. Plaintiffs filed their First

Amended Complaint on September 21, 1999. On October 28, 1999, Defendants filed a Notice of Removal in the United States District Court for the District of Maryland. Plaintiffs promptly moved to remand.

On March 15, 2000, this Court issued a decision retaining jurisdiction over the case. The Court concluded that the lone Maryland defendant had been fraudulently joined, and that its presence therefore did not destroy diversity. Plaintiffs now seek leave to file a Second Amended Complaint which would effectively defeat this Court's diversity jurisdiction.

II. LEGAL STANDARD

When leave to amend is sought after removal, "[i]f . . . the plaintiff seeks to join additional defendants whose joinder would destroy subject matter jurisdiction, the court may deny joinder, or permit joinder and remand the action to the State court." 28 U.S.C. § 1447(e). This decision is committed to the sound discretion of the trial court. Mayes v. Rapoport, 198 F.3d 457, 461-62 (4th Cir. 1999). The court is entitled to consider all relevant factors, including: "the extent to which the purpose of the amendment is to defeat federal jurisdiction, whether the plaintiff has been dilatory in asking for amendment, whether the plaintiff will be

significantly injured if amendment is not allowed, and any other factors bearing on the equities." Id. at 462.

III. DISCUSSION

The proposed amendment, among other things, seeks to add three Maryland defendants and a Delaware plaintiff. Joinder of any of these parties would destroy the subject matter jurisdiction of the court. The identity of many of the proposed Defendants has been previously known to the Plaintiffs, and the Plaintiffs have presented no adequate justification for their delay in seeking to add these parties.

With respect to several of the proposed defendants, Plaintiffs do not even contend that they were a part of the pre-1978 conspiracy which allegedly resulted in lead-contamination of the Plaintiffs' homes, and which is the "gravamen" of both this lawsuit and, notably, even the proposed Second Amended Complaint. Pl. Mot. at Ex. A, p. 15 ¶¶ 20-21, p. 19 ¶ 32. Rather, Plaintiffs claim that these Defendants, who allegedly manufactured non-lead paint which is present in the Plaintiffs' homes, can be held liable for a conspiracy regarding a failure to warn of the hazards associated with surface preparation in homes containing lead paint. Plaintiffs argue that they will be prejudiced if they are not permitted to add these defendants.

The Court has had occasion to address this argument previously in this lawsuit. Following an exhaustive analysis of the allegations in the First Amended Complaint, the Court determined that Plaintiffs, who are the masters of their own complaint, have not alleged a conspiracy regarding resurfacing instructions. Memorandum and Order, March 15, 2000 at 21-25. As noted therein, Plaintiffs may very well have a claim against the entire universe of paint manufacturers, past and present, for a failure to warn of the hazards associated with surface preparation. If they believe that such a claim exists and will succeed, Plaintiffs certainly can, and no doubt will, file such a lawsuit. However, that claim is not a part of the failure to warn claims that were included in the First Amended Complaint.

The First Amended Complaint refers to failures to warn regarding the "hazards and dangers associated with lead pigments and lead-based paint products which they caused to be placed into the stream of commerce," and "the risks involved in the use of lead-based paint." See First Am. Compl. at p. 106-07 ¶¶ 298-304; p. 112 ¶¶ 326-29. No party has moved to dismiss those claims. They remain a part of this lawsuit.

The only proposed amendment which appears to be based upon more than a desire to defeat this Court's diversity

jurisdiction is the proposed addition of Duron, Inc. ("Duron"), which is a Maryland citizen for diversity purposes, as a defendant. In their proposed Second Amended Complaint, Plaintiffs allege that Duron "produced, mined, marketed, promoted, designed and/or manufactured its own lead products and promulgated, supported and/or promoted the production, marketing, designing and the manufacturing of the other defendants' lead products." Pl. Mot. at Ex. A p. 30, ¶ 49. Although Duron has been routinely dismissed from lead paint actions around the country on the basis that it did not manufacture lead paint, Plaintiffs rely on evidence which was recently provided by the Baltimore City Health Department which indicates that Duron did, in fact, produce lead paint. Pl. Reply at Ex. A. Plaintiffs contend that they lacked knowledge of this evidence when they filed their initial and first amended complaints.

Defendants argue that the fact, if it is a fact, that Duron manufactured lead paint is not material to Plaintiffs' proposed amendment. Defendants argue that the addition of Duron is futile, because:

(1) Duron never manufactured lead paint;

(2) Duron never manufactured lead pigment;

(3) Plaintiffs have not alleged a specific causal

connection between Duron's lead paint or lead pigment, as opposed to the lead paint or lead pigment of any other manufacturer, and any of the Plaintiffs' alleged damages; and

(4) The allegation that Duron was a member of the NPCA is insufficient to implicate Duron in any conspiracy regarding lead pigment or lead paint.

According to Defendants, these arguments are fatal to Plaintiffs' claims against Duron, and consequently, Plaintiffs will not be prejudiced by denial of the Motion to Amend to add Duron.

Defendants' argument regarding Duron's non-production of lead paint requires little discussion in the dismissal context. Plaintiffs have provided the Court with recently discovered evidence, obtained from the Baltimore City Health Department, which reports that a 1959 test performed on a can of Duron paint indicated a lead level of seventeen percent. This evidence is sufficient to create the possibility (which is all that is now needed) that Plaintiffs might be able to succeed in establishing that Duron manufactured lead paint. Whether, ultimately, Plaintiffs will have sufficient evidence to establish a genuine issue of material fact, remains to be seen.

Defendants' argument based on the "fact" that Duron never manufactured lead pigment is unavailing. The Second Amended

Complaint alleges that Duron produced "lead products." Although this allegation is broad, it is sufficient to include an allegation that Duron manufactured lead pigment. Moreover, even if Duron in fact never manufactured lead pigment, and only manufactured lead paint, it might still be held liable for the actions of the pigment manufacturers by virtue of its inclusion of lead pigment in its products and/or its participation in the alleged conspiratorial scheme to perpetuate the use of lead pigment and lead paint in residential properties.

The argument concerning Plaintiffs' failure to allege a causal connection between any of Duron's products and Plaintiffs' injuries is premised entirely upon Defendants' argument that Plaintiffs' failure to identify the manufacturer of the lead paint that is present in their individual homes is fatal to the tort claims against all of the Defendants. For the reasons stated in the Memorandum and Order re Defendants' Motions to Dismiss the Complaint Based Upon Failure to Identify the Product Manufacturer, the Court concludes that Plaintiffs can avoid dismissal notwithstanding Plaintiffs' failure to identify the particular manufacturer/conspirator which was the direct cause of each of their individual injuries. Accordingly, Duron would not necessarily be

entitled to dismissal.

Finally, Defendants' reliance upon the opinions of Judges Heller and McCurdy in Wright and Smith for the proposition that "mere" membership in a trade association is insufficient to establish conspiracy liability is disingenuous. Judge Heller's decision in Wright came after discovery, on a motion for summary judgment, and was premised upon the Plaintiffs' failure to produce evidence that the Defendants' had any "specific intent" to further the alleged scheme. Wright v. Lead Industries Ass'n, Case Nos. 94363042/CL190487, 94363943/CL190488 (Cir. Ct. for Balt. City, June 20, 1996) (Heller, J.) at 9-10. The decision, by its own terms, supports a conclusion that a defendant who possesses such an intent could be held liable on a conspiracy theory, assuming all of the other elements of civil conspiracy are established. See id. This Court cannot now determine that Duron necessarily lacked an intent to participate in a common plan to market lead products through its membership in the NPCA.

In Smith, contrary to Defendants' suggestion, Judge McCurdy did not hold that membership in the NPCA could never establish liability. Rather, Judge McCurdy found that, with respect to Bruning Paint Company, the Plaintiffs could not establish a conspiracy among the members of the NPCA with

regard to surface preparation instructions. Smith v. Lead Industries Ass'n, Case No. 24-C-99004490 (Cir. Ct. Balt. City June 21, 2000) (McCurdy, J.) at 19-22. Unlike the situation involved in the case at Bar with respect to Duron, it was established in Smith that "Bruning never produced lead paint [or lead pigment], and as such, could not have conspired with others to either sell or conceal their hazardous nature." Id. at 19. Moreover, Judge McCurdy only found the Plaintiffs' allegations of a culpable conspiracy with regard to surface preparation instructions (as opposed to warnings on lead paint cans) to be insufficient. Id. at 21-22. Judge McCurdy did not consider the allegations concerning marketing of lead products and failure to warn, because they could not implicate Bruning. In the case at Bar, the allegations contained in the proposed Second Amended Complaint regarding the NPCA and its members may very well be deficient with respect to surface preparation. However, the Court finds that the proposed Second Amended Complaint is amply sufficient to allege a culpable conspiracy regarding the marketing of lead pigment and lead paint, as well as the concealment of and failure to warn of the hazards associated with lead paint. See, e.g., Pl. Mot. at Ex. A, p. 63 ¶ 148, p. 78-79 ¶¶ 196-98, p. 92 ¶ 35, p. 96 ¶¶ 44-45, p. 101-02 ¶¶ 61-64. If, after development

of the evidence in this case, it appears that Plaintiffs' claims lack an evidentiary basis, the Defendants can raise the issue in a properly supported motion for summary judgment.

In sum, the Court concludes that the Second Amended Complaint may state a viable claim against Duron. As a consequence, Plaintiffs would be prejudiced by the Court's denial of their Motion to Amend. Accordingly, the Plaintiffs will be permitted to amend the First Amended Complaint to add Duron as a Defendant.

As a result of the addition of Duron, a Maryland defendant, this Court no longer has subject matter jurisdiction over the action.[1] Accordingly, the case shall be remanded to the Circuit Court for Baltimore City.

IV. CONCLUSION

For the foregoing reasons:

1. Plaintiffs' Motion to Amend First Amended Complaint [Paper No. 103] is GRANTED.

2. The proposed Second Amended Complaint filed therewith is accepted as of this date with regard to the addition of Duron, Inc. as a party Defendant.

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[1]In light of this conclusion, the Court need not address the arguments presented by American Cyanamid in their Supplemental Memorandum in Opposition to Plaintiffs' Motion to Amend. The arguments presented therein may be considered by the state court after remand, in conjunction with American Cyanamid's pending Motion for Summary Judgment [Paper No. 94].

3. The addition of Duron, Inc., a Maryland citizen, eliminates the diversity jurisdiction of this Court.

4. This case shall be remanded to the Circuit Court for Baltimore City by separate Order.

5. Plaintiffs' Motion to Remand [Paper No. 115] is DENIED as MOOT.

SO ORDERED this 17th day of August, 2000.

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Marvin J. Garbis
United States District Judge